Mauka, Inc. *and* Local Union No. 673 of the International Brotherhood of Electrical Workers, AFL–CIO. Cases 8–CA–27263, 8–CA–27296, and 8–CA–27434

March 8, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 13, 1996, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below and to adopt the recommended Order as modified and set forth in full below.

The judge found that employee Cregg Law was not an unfair labor practice striker and, therefore, was not entitled to reinstatement by the Respondent upon his unconditional offer to return to work. We disagree.

After work on April 5, 1995,[4] employees Cregg Law and Keith Jordan, wearing union T-shirts and buttons, approached the Respondent's vice-president, Paul Boros, and asked for a raise that would include union wages and benefits. Boros told the employees that he would not speak to them about wages and benefits as a group, but would talk to them individually in about 2 weeks. According to Jordan's credited testimony, Boros also told the employees "don't ever wear [the Union T-shirts and buttons] in my shop again, or on our property, or on our jobs." We agree with the judge that Boros statements violated Section 8(a)(1).[5]

After this encounter, Jordan and Law made signs which stated that the Respondent refused to pay union wages and benefits, and the two employees picketed on nonworking time with these signs at the jobsites where they were assigned for the following 2 days, April 6 and 7. Both employees were wearing union T-shirts on the job and while they were picketing. Boros removed both Law and Jordan from the jobsites on April 6 because of alleged requests from the customers at whose jobsites Jordan and Law were picketing. We agree with the judge's finding that the Respondent's removal of Jordan and Law from the jobsites where they were working violated Section 8(a)(3) and (1).

The Respondent instructed both employees to report to the shop on April 7. At lunchtime, both employees picketed outside the shop with the signs stating that the Re-

[1] The Respondent has moved to correct the transcript of the hearing in certain respects. We find that the Respondent's proposed corrections reflect obvious inadvertent errors in transcription of the testimony in question, and we grant the motion.

The Respondent has excepted to the judge's failure to grant its motion to correct the record by including the text of a tape recording played by its counsel during the hearing solely for the purpose of refreshing witness Cregg Law's recollection. We affirm the judge's ruling for the reasons stated by him, and we grant the General Counsel's motion to strike those portions of the Respondent's brief that rely on the excluded evidence.

No exceptions were filed to the judge's finding that the Respondent's vice president, Paul Boros', statement to Law during Law's employment interview that Boros did not want to be unionized did not violate Sec. 8(a)(1).

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent did not violate the Act when it failed to recall Ronald Sabatini in March 1995, Member Liebman finds that, even assuming that the General Counsel did establish a prima facie case that the Respondent's failure to recall Sabatini was unlawfully motivated, the Respondent has satisfied its burden under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F. 2d 800 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), to prove that it would not have recalled Sabatini even in the absence of his union activities.

In fn. 5 of his decision, the judge found that the Respondent has not proved that Law's picketing constituted a violation of Sec. 8(b)(4) because it did not show that the picketing was "solely" for the purpose of appealing to employees of secondary employers. We note that under Board law it must be shown only that appealing to employees of secondary employers is "an" object of picketing for a violation to be established. E.g., *NLRB v. Teamster Local 753,* 335 F.2d 326, 369 (7th Cir. 1964).

[4] All dates are in 1995 unless otherwise specified.

[5] The Respondent has excepted, inter alia, to the judge's finding that it violated Sec. 8(a)(1) by refusing to meet with Law and Jordan jointly to discuss their request for union wages and benefits. In its brief, the Respondent argues that an "employer has no obligation to meet with employees in a group to discuss their wages." Assuming arguendo that the Respondent's statement of the law is correct, if "an employer [acts] with the purpose of restricting or preventing employees form engaging in protected activity,'' a violation of Sec. 8(a)(1) can still be found. *Tutalin Electric,* 319 NLRB 1237 (1995). That is the situation here. As set forth above, the judge found that in the same conversation in which Boros refused to meet with Law and Jordan, Boros unlawfully threatened employees with job loss when he told them that if they were to vote for a union, the Respondent would become a general contractor and "no one would work." Other unfair labor practices committed by the Respondent during the organizational campaign include coercively interrogating employees, giving employees the impression of surveillance, threatening employees with physical harm, removing employees from their jobsites, reassigning employees to other work, causing employees to lose wages, all because of the employees' union or other protected activities. In this context, we find that the Respondent's refusal to meet with Law and Jordan did not constitute the exercise of a legal right reserved to it under the NLRA, but that it was one more effort to discourage employee participation in union and other protected activities, and that it would foreseeably have that effect.

Member Hurtgen does not agree that the Respondent violated the Act by refusing to meet jointly with employees Law and Jordan. Member Hurtgen's colleagues do not quarrel with the proposition that the Respondent had no obligation to meet jointly with these two employees, And, the recitation of the Respondent's other unfair labor practices does not, by itself, establish unlawful motive as to the otherwise unlawful refusal to meet. Finally, the fact that the Respondent has committed other unfair labor practices does not take away the Respondent's right to refuse to meet jointly.

spondent refused to pay union wages and benefits. While they were picketing, Boros came out of the shop and photographed them. Law went back into the shop and told Boros that he was going on an unfair labor practice strike to protest the unlawful discipline of himself and Jordan and the alleged unlawful discharge of fellow employee Ronald Sabatini.

Law left the shop and went to the Union's hall where he discussed with Union Representative David Thomas what had occurred and his decision to go on strike. The following Monday, April 10, Law and Thomas picketed outside the shop carrying signs that read "Unfair Labor Practice Strike Against Mauka Electric." Shortly after the picketing began, Boros appeared, said to Law, "I'm going to cut your head off for this," and photographed him.[6]

On April 13, Law hand delivered to Boros a written notice making an unconditional offer to return to work. Boros told Law to call between 4 and 5 p.m. that afternoon, because he might have some work for him then. When Law called that afternoon, Boros told Law that he had no work for him and that he was laying off employees. Law heard nothing further from the Respondent until he received a letter from Boros, dated May 15, stating that it considered Law to have abandoned his job and that he was being removed from the employee list.

The judge found that Law was not an unfair labor practice striker on the grounds that his strike was not concerted because it was not "engaged in with or on the authority of other employees," but rather was engaged in "solely by and on behalf of the employee himself." The judge noted that no other employee joined Law in striking, and that the record failed to establish that he discussed such a strike with or sought to enlist the support of any fellow employee, including Jordan, with whom he had just been picketing outside the shop. The judge further concluded that because Law was not an unfair labor practice striker, the Respondent was under no continuing obligation to contact Law and offer him employment.

Contrary to the judge, we find that Law was an unfair labor practice striker and that he was entitled to immediate reinstatement upon his unconditional offer to return to work. We conclude that Law's strike was a direct outgrowth of his activities on behalf of the Union and was engaged in to protest the Respondent's unfair labor practices committed in the context of the Union's organizing campaign.

The judge found, and we agree, that it was unlawful for the Respondent to prohibit employees from wearing union insignia and to discipline them for doing so. Law's picket signs and his statement to Boros that he was protesting this and other alleged unfair labor practices leave no question as to Law's motivation for the strike. A strike that is motivated, even in part, by an employer's unfair labor practices is an unfair labor practice strike.[7]

We find that Law's protest of the Respondent's unlawful discipline was not a case of one employee engaging in conduct for only his own benefit. Rather, Law's actions must be viewed in the context of employees attempting to organize a union, approaching the employer for union wages and benefits, picketing the employer for union wages and benefits, and ultimately striking the employer because of the unfair labor practices perpetrated against those employees because they wanted to organize.[8]

In finding that Law's strike was unprotected, the judge relied on *DeMuth Electric,* 316 NLRB 935 (1995), in which the Board adopted an administrative law judge's decision finding that a single employee's departure from the job did not amount to a protected strike and that the respondent's failure to reinstate him did not violate the Act. Unlike the situation herein, the employee in *DeMuth,* supra, did not suggest that he was protesting unfair labor practices against employees, he never at any time solicited the support of any fellow employee, and he acted against the wishes of the union for which he was organizing. In contrast, here Law originally picketed with Jordan for union wages and benefits as part of the organizing campaign, made it clear he was protesting the treatment of other employees as well as himself, and engaged in the strike with the support of the Union for which he was organizing. In fact, Law discussed an unfair labor practice strike with Union Representative Thomas prior to informing Boros of his intention to engage in an unfair labor practice strike, and Thomas picketed with Law, joining him in carrying signs protesting the unfair labor practices which were committed in the course of the organizing campaign. In these circumstances, we find that Law's strike was part and parcel of his union activity.

We find that Law made an unconditional offer to return to work when he hand delivered a note to that effect to Boros on April 13. We further find that he was entitled to immediate reinstatement by the Respondent, and

[6] The judge found that the Respondent violated Sec. 8(a)(1) on both April 7 and 10 by photographing employees engaged in protected activities. We agree with the judge that the April 10 incident was clearly coercive and unlawful inasmuch as the photographing was accompanied by a threat of physical harm. We find it unnecessary to pass on the legality of the April 7 incident because the finding of an additional violation would be cumulative and would not affect the remedy.

[7] *C-Line Express,* 292 NLRB 638 (1989); *Tall Pines Inn,* 268 NLRB 1392 (1984). Accord: *Northern Wire Corp. v. NLRB,* 887 F.2d 1313 (7th Cir. 1989).

[8] Because Law was engaged in union activity, it is irrelevant that no other employee joined him in striking. *Carpenters Local 925:* 279 NLRB 1051, 1059 fn. 40 (1986) (citing the Supreme Court's decision in *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984): accord: *Manno Electric,* 321 NLRB 278, 281 (1996) ("the Board holds that an employee acting alone to form, join, or assist a labor organization is nevertheless protected by Section 7 of the Act").

that the Respondent's failure to reinstate him violated Section 8(a)(3) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 3(e):

"(e) Refusing to meet with employees collectively to discuss their request for union wages and benefits in order to discourage their participation in union and other protected activities."

2. Insert the following paragraphs 5 and 6, and renumber the present paragraphs 5 and 6 as paragraphs 7 and 8.

"5. Employee Cregg Law's April 10, 1995 strike was motivated by the Respondent's unfair labor practices and was, therefore, an unfair labor practice strike.

"6. By failing to immediately reinstate unfair labor practice striker Cregg Law upon his April 13, 1995 unconditional offer to return to work, the Respondent has violated Section 8(a)(3) and (1) of the Act."

AMENDED REMEDY

Having found that the Respondent unlawfully failed and refused to reinstate unfair labor practice striker Cregg Law upon his April 13, 1995 unconditional offer to return to work, we shall order that the Respondent offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, discharging, if necessary, any replacements hired after April 10, 1995. The Respondent shall also be required to make Law whole for any loss of earnings and other benefits that he may have suffered by reason of the Respondent's refusal to reinstate him, from the date of his offer to return to work. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest to be computed as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[9]

ORDER

The National Labor Relations Board orders that the Respondent, Mauka, Inc., Mentor, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Local Union No. 673 of the International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization by failing and refusing to immediately reinstate employees upon their unconditional offer to return to work after they have engaged in a strike to protest the Respondent's unfair labor practices.

(b) Coercively interrogating employees concerning their union or other protected activities.

(c) Giving employees the impression that their union or other protected activities are under surveillance.

(d) Threatening employees with loss of employment if they select the Union or any other labor organization as their collective-bargaining representative.

(e) Prohibiting employees from wearing shirts displaying the Union's logo while working or on its property.

(f) Refusing to meet with employees collectively to discuss their request for union wages and benefits in order to discourage their participation in union and other protected activities.

(g) Coercively photographing employees while they are engaged in union or other protected activities.

(h) Threatening employees with physical harm for engaging in picketing outside its facility.

(i) Removing employees from their jobsites, reassigning them to other work, and causing them to lose wages because they engaged in union or other protected activities.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Cregg Law and Keith Jordan for any loss of wages suffered as a result of the discrimination against them on April 6 and 7, 1995, plus interest computed in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, offer Cregg Law full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging if necessary, replacement employees hired after April 10, 1995.

(c) Make Cregg Law whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to reinstate him, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Cregg Law and Keith Jordan, and the unlawful refusal to reinstate Cregg Law, and within 3 days thereafter notify them in writing that this has been done and that the discipline and the refusal to reinstate will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Mentor, Ohio facility copies of the attached notice

[9] In addition, we shall modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Local Union No. 673 of the International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization by failing and refusing to immediately reinstate employees upon their unconditional offer to return to work after they have engaged in a strike to protest our unfair labor practices.

WE WILL NOT coercively interrogate employees concerning their union or other protected activities.

WE WILL NOT give employees the impression that their union or other protected activities are under surveillance.

WE WILL NOT threaten employees with loss of employment if they select the Union or any other labor organization as their collective-bargaining representative.

WE WILL NOT prohibit employees from wearing shirts displaying the Union's logo while working or on our property.

WE WILL NOT refuse to meet with employees collectively to discuss their request for union wages and benefits in order to discourage their participation in union and other protected activities.

WE WILL NOT coercively photograph employees while they are engaged in union or other protected activities.

WE WILL NOT threaten employees with physical harm for engaging in picketing outside our facility.

WE WILL NOT remove employees from their jobsites, reassign them to other work, and cause them to lose wages because they engage in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Cregg Law and Keith Jordan for any lost wages suffered by reason of our discrimination against them for having engaged in protected activities, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Cregg Law full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacement employees hired after April 10, 1995.

WE WILL make Cregg Law whole for any loss of earnings and other benefits resulting from our refusal to reinstate him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Cregg Law and Keith Jordan, and the unlawful refusal to reinstate Cregg Law, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline and the refusal to reinstate will not be used against them in any way.

MAUKA, INC.

Paul C. Lund, Esq., for the General Counsel.
Domenic Bellisario, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
Joyce Goldstein, Esq., of Cleveland, Ohio, for the Charging Party.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon charges[1] filed by Local Union No. 673 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union), the Regional Director for Region 8 of the National Labor Relations Board (the Board) issued a consolidated complaint on June 30, 1995, alleging that Mauka, Inc.[2] (the Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Relations Act (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Cleveland, Ohio, on September 6 and 7, 1995,[3] at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration.[4] Upon the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I.THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was an Ohio corporation with its principal office and place of business in Mentor, Ohio, engaged in the electrical contracting business. Annually, in the course and conduct of its business operations, the Respondent purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Ohio. The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Sufficiency of the Charges

At the opening of the hearing, the Respondent moved to dismiss certain of the complaint allegations on the grounds that they do not relate to any charge filed in this case. I deferred ruling on the motion pending receipt of the parties' post-hearing briefs. Counsel for the General Counsel contends that the filed charges are broad enough to encompass the complaint allegations and that the Employer has been put on notice as to all of the matters alleged in the complaint. The function of a charge is not to give the employer notice of a specific claim against it, but to draw "the Board's attention to a cause for economic disturbance.'' *Redd-I, Inc.,* 290 NLRB 1115, 1117 fn. 12 (1988). In *NLRB v. Fant Milling Co.,* 360 U.S. 301, 307–308 (1959), the Supreme Court stated that the Board's inquiry is not confined "to the specific matters alleged in the charge'' and that

> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

In *Nickles Bakery of Indiana,* 296 NLRB 927, 928 (1989), the Board ruled that its general requirement that "the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge'' would also apply to allegations involving Section 8(a)(1) of the Act and that such determinations would be made by applying the standards outlined in *Redd-I, Inc.,* supra:

> First, the Board will look at whether the . . . allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the . . . allegations arise from the same factual circumstances or sequence as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations. [Footnotes ommitted.]

The Respondent raises this issue with respect to complaint paragraph 6(A) concerning an alleged unlawful interrogation and impression of surveillance on December 20, 1994. The charge in Case 8–CA–27263 alleges that on or about December 22, 1994, the Employer "threatened to go out of business if its employees exercised their protected rights to organize,'' but does not refer to any incident on December 20. Applying the *Redd-I* standard, I find that the allegations in paragraph 6(A) are closely related to and arise from the same sequence of events as the allegation in the charge alleged to have occurred two days later. Both involve alleged attempts by the Employer to coerce employees and interfere with their attempts to secure union representation. In connection with paragraphs 6(A) and (B) concerning the alleged incident on December 22, the Respondent also contends that the portion of the charge in Case 8–CA–27263 relating to that incident was withdrawn by the Union because it was not included in the amended charge it filed in that case. I find there is no evidence that the Union sought to withdraw that portion of the charge or that the Regional Director approved its withdrawal or notified the parties to that effect. Rather, it appears that the language concerning the December 22 incident was simply inadvertantly omitted when the amended charge was filed. I also find that the incident alleged to have occurred on December 20, involving employee Ronald Sabatini, is directly related to and arises from the same factual circumstances underlying the charge and amended charge in Case 8–CA–27263, that Sabatini was unlawfully discharged by the Employer.

The allegation in paragraph 6(C) concerning an alleged statement by the Employer on March 17, 1995, that expressed opposition to union representation involves conduct similar to that charged to have occurred on December 22. The allegations in paragraphs 6(D) and (E) concern alleged coercive statements

---

[1] The charge in Case 8–CA–27263 was filed on March 31, 1995, and an amended charge was filed on May 15, 1995. The charge in Case 8–CA–27296 was filed on April 10, 1995, and that in Case 8–CA–27434 on May 26, 1995.

[2] At the hearing it was pointed out that the correct name of the Respondent is Mauka, Inc. not Mauka Electric, Inc. The caption has been amended to reflect this.

[3] All dates are in 1995 unless otherwise indicated.

[4] The Respondent has filed a motion to correct the hearing transcript by including the text of one of two tape recordings its counsel played during the hearing. The tape was played solely for the purpose of refreshing a witness' recollection. It was not marked as an exhibit or authenticated and counsel made no attempt to place the contents of the recording in the record at the hearing. The motion to correct the record is denied.

by the Employer to employees on April 5, 1995. Both 8(a)(1) allegations involve Employer conduct arising from the attempts of employees Cregg Law and Keith Jordan to get it to recognize the Union as their bargaining representative. That conduct was the subject of the charge in Case 8–CA–27296, alleging violations of Section 8(a)(3) and (1) on or about April 7, 1995, including that Law and Jordan were "disciplined'' as a result of their activities. I find there is a sufficient factual nexus between these allegations and those in the charge. I also find there is such a nexus between the allegation in paragraph 6(H) and those in the charges in Cases 8–CA–27296 and 8–CA–27434.

The allegation in paragraph 7(B) concerning the termination of Sabatini in March 1995 is directly related to in the charge in Case 8–CA–27263 which alleges that the termination occurred in January 1995. Although there is a difference in the actual date of termination, the nature of the alleged violation is the same and arises from the same factual circumstances referenced in the charge. The allegations in Paragraphs 7(C)–(E) concerning the Employer's actions with respect to Law and Jordan on April 6 and 7, 1995, arise from the same factual circumstances raised in the charge in Case 8–CA–27296 discussed above. I find that there is a sufficient factual nexus between all of the complaint allegations and the underlying charges and that the Respondent's motion to dismiss portions of the complaint should be denied.

B. The 8(a)(1) Allegations

1. Incidents on December 21 and 22, 1994

Ronald Sabatini was hired by the Respondent as an electrician in April 1994. He testified that during the early 1970s he had belonged to the same union local as Andy Parker who is employed by the Respondent in a supervisory position. During a conversation in June 1994, Sabatini mentioned to Parker that there was a union election being held at an employer for whom he had previously worked. Later that same month, Parker told Sabatini that Company Vice President Paul Boros Jr. was worried that Sabatini going to try and organize the shop. Sabatini told Parker that he was not. In October 1994 Sabatini, who has a diabetic condition and said he was interested in joining the Union in order to get health benefits, spoke with Union Representative David Thomas about organizing the Respondent's employees. Thereafter, the Union sent a letter, dated November 18, 1994, to the Respondent asking for the opportunity to meet with it and discuss the possibility of its signing a "Letter of Assent" and becoming an organized employer. By letter dated December 29, 1994, the Respondent declined the Respondent's offer.

The Union scheduled an organizing meeting for the Respondent's employees to be held on December 21, 1994. Employees were informed of the meeting by Sabatini and telephone calls from Thomas. Sabatini testified that on the afternoon of the day of the meeting, he was working at a Manor Care job when Parker came up to him and twice asked him what right he had to try to start a union. Sabatini responded that he needed health benfits. Parker asked why he could not get Blue Cross or similar coverage and Sabatini said he could not afford to pay for it. On the following day Boros called a meeting of all employees at the shop. Boros conducted the meeting and Parker and Boros' wife and father, who are associated with the company were also present. Sabatini testified that Boros said that he had received a notice from the Union about organizing the company, that the Union was not in the company's best interest, and that if it went union, they would all be out of a job as it would get out of the electrical business and become a general contractor. Boros said that if the Union was voted in he would have to take union dues out of their pay and that the Union would assign their foremen. He also said that the company's client base would change if it went union and that the employees would have to make up their own minds.

Keith Jordan was an employee of the Respondent from August 1994 to April 1995. He testified that he was first approached about the possibility of a union by Sabatini in mid-November 1994 and that Sabatini informed him of the union meeting on December 21, which he attended. Earlier in the day of the meeting, Parker asked him if he was "going to the big meeting that evening'' and Jordan responded that he was. On the following day he was ordered to attend a mandatory meeting for all employees at the Employer's shop. At the meeting Boros stated that if they were to vote for a union, the Company would switch gears and become a general contractor and "no one would work.''

Boros testified that he called the meeting after receiving the November 18, 1994 letter from the Union. He told the employees that he did not consider it to be in the best interests of the company or the employees to be unionized and that they should talk to individual union members about it. Karl White has been employed by the Respondent as an electrician for over 8 years and was called by it as a witness. He testified that at the meeting Boros told them they should talk to union and nonunion people and make their own decisions, but could recall nothing else that was said. Pursuant to leading questioning by the Respondent's counsel, he testified that Boros did not say that if the employees unionized they would lose their jobs. On cross-examination, he testified that Boros did not say that a union would not be in the best interests of the company or the employees and he did not remember him saying that the direction of the business might change. Cameron Cantrell is a 5-year employee of the Respondent called as its witness. He testified that Boros said that they "should explore both avenues'' and make their own decisions about whether to unionize. He too could remember nothing else that was said and testified pursuant to leading questions by the Respondent's counsel that Boros did not threaten that people would lose their jobs or that the company would close down if they selected a union. On cross-examination, he testified that Boros did not say that the Union was not in the best interest of the Company or the employees. When shown an affidavit he had given to a company attorney, dated May 5, 1995, in which he had stated that Boros had made those statements, he said that Boros had said it was not in the best interest of the Company but "he never said the employees.'' He said the statement to the contrary in the affidavit was incorrect and "maybe a typo or something else.''

Analysis and Conclusions

I credit the uncontradicted testimony of Sabatini and Jordan about their conversations with Parker on December 21, 1994, in which he interrogated Sabatini about his union activity and asked Jordan if he was going to the "big meeting'' that evening, an obvious reference to the meeting employees were scheduled to have with the Union. Parker is a supervior who was not called as a witness by the Respondent and his absence was not explained. I infer that his testimony would not have supported the Respondent position on these issues. See *International Automated Machines,* 285 NLRB 1122, 1123 (1987). Parker's

statement to Sabatini implied that the Employer was aware of his involvement in the Union's organizing effort. At that point, Sabatini was not an open supporter of the Union. Although the Union had contacted the Employer about organizing prior to December 1994, there is no evidence that it had identified Sabatini as an organizer or that he had ever informed Parker of his involvement. On the contrary, the only conversation they had about the Union was in June 1994 in which Sabatini denied any involvement after Parker told him Boros was worried that he would attempt to bring a union in. Considering all the surrounding circumstances, as required by *Rossmore House,* 269 NLRB 1176, 1177 (1984), I find that Parker's comments were coercive, whether they be considered as an interrogation or as merely rhetorical. If the former, they constituted an unlawful inquiry into protected activity and sought to compel Sabatini to justify exercising rights protected by Section 7 of the Act. If the latter, they implied that the Employer disapproved of Sabatini's involvement with the Union. There is no evidence that Jordan was an open supporter of the Union or that the Union meeting had been openly publicized before Parker spoke to him. Parker's questioning him about attending the meeting had no legitimate purpose. It implied that the Employer was being informed of the employees' protected activities and coercively inquired into Jordan's personal involvement. I find that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Sabatini and Jordan and by giving the impression that protected activities were under surveillance. E.g., *Spring City Knitting Co.,* 285 NLRB 426 fn. 4 (1987); *Hunter Douglas, Inc.,* 277 NLRB 1177, 1180–1181 (1985).

I credit the testimony of Sabatini as to what was said by Boros at the employee meeting on December 22, 1994, over that of Boros, White and Cantrell, based on their demeanor while testifying and the content of their testimony. Sabatini appeared to have the best recollection of the details of what was actually said. His testimony concerning Boros' threat to change the nature of the business and put the employees out of work if they went union was corroborated by Jordan. Boros' limited testimony about what he said at the meeting does not directly contradict them. Initially, neither White nor Cantrell could remember anything that Boros said during the meeting, which White estimated lasted 30 to 45 minutes, other than they should talk to union and nonunion people and make up their own minds. Both contradicted Boros' testimony by saying that he did not say that a union was not in the best interests of the company or the employees. Cantrell's testimony about what Boros said is partially contradicted by an affidavit he had previously given the Respondent's attorney. I do not agree with the Respondent's argument that Sabatini's testimony that Boros' talking about deducting dues and the Union selecting foremen if they went union is "inherently inconsistent'' with his saying that they would lose their jobs if they went union. The former statements involve arguments against choosing union representation, while the latter threatens adverse consequences if those arguments should prove unsuccessful. I find that Boros did threaten the employees that, if they chose representation by the Union, the nature of the Employer's business would change and they would lose their jobs. His prediction of adverse consequences was not carefully phrased on the basis of objective factors beyond his control and violated Section 8(a)(1). *Triec, Inc.,* 300 NLRB 743, 748 (1990); *Laidlaw Transit,* 297 NLRB 742 (1990).

2. Incident on March 17, 1995

On March 15, Cregg Law applied for a job with the Respondent by dropping off a resume. He received a call to come for an interview on March 17 and met with Boros. Law testified that, while they were discussing his ability and experience, they "also discussed some union activity that had been going on in the Mauka Company previously to me being there.'' During that discussion, Boros said that there had been some union activity going on at the Company and that he did not want to be unionized. Law did not respond and they resumed discussing the electrical business. Law was offered a job and commenced work on March 20. The complaint alleges that Boros' remark that he did not want to be unionized violated Section 8(a)(1).

Analysis and Conclusions

The General Counsel contends that Boros' unsolicited remark expressing his opposition to union organizing during an employment interview was coercive. The record is unclear as to how the subject of union activity arose. There is no evidence that Boros questioned Law about his union sentiments or said anything that constituted a promise of benefits, a threat of reprisal, or that, objectively, would be considered to interfere with his rights. I shall recommend that this allegation be dismissed.

3. Incident on April 5

The credible and uncontradicted testimony of Law and Jordan establishes that during the first week of April, they went to the Employer's facility after work and tried to meet with Boros to ask for a raise that would include union wages and benefits. When Law explained why they were there, Boros told them that he would not speak to them about wages and benefits as a group, but would talk to them individually in about 2 weeks. Both employees were wearing T-shirts and buttons with the Union's logo on them. Boros told them that they were not to wear the union T-shirts and buttons in his shop or on his property or while on their jobs. Boros admitted telling them not to wear shirts with union insignia but testified that he also told them that they could not wear "anything that was potentially controversial'' or "any shirt with what could be construed as a political statement on it,'' that might offend the "unknown sensibilities'' of an owner or contractor for whom they might be working. The complaint alleges that Boros' remarks were threatening and coercive and violated the Act.

Analysis and Conclusions

Section 7 guarantees employees the right to engage in concerted activities for their mutual aid and protection. I find that the Employer's blanket refusal to meet with Law and Jordan to discuss the subject of an increase in their wages and benefits and its telling them that it would not hold any such discussions with them acting together but only on an individual basis directly interfered with and nullified those rights in violation of Section 8(a)(1).

In the absence of special circumstances, an employer cannot infringe on its employees' rights by prohibiting them from wearing or displaying insignia indicating support for a union. E.g., *Albertsons, Inc.,* 272 NLRB 865, 866 (1984); *Ohio Masonic Home,* 205 NLRB 357 (1973). There was no evidence that the Respondent's employees were required to wear a specific uniform while on the job. Jordan testified that during his tenure with the Respondent he often wore a shirt with the logo of a California Iron Workers union local on it on the without

anything ever being said to him. Boros' professed fear that the Union insignia on the shirts and pins might possibly offend some customers' "unknown sensibilities'' does not constitute special circumstances which outweigh the employees' Section 7 rights. *Virginia Electric & Power Co.,* 260 NLRB 408, 409 (1982). The Respondent contends that this allegation should be dismissed as de minimis because after conferring with this attorney Boros rescinded his directive the following day. What he did was change his order that they not wear union insignia to a request that they not do so. "I went back to each one individually and made a request that they not wear the shirts . . . .'' I find that this did not lessen the interference with their protected rights; *DeMuth Electric,* 316 NLRB 935 (1995); *Comcast Cablevision,* 313 NLRB 220 fn. 3 (1993); or fully remedy the unfair labor practices. *Service Spring Co.,* 263 NLRB 812, 817 (1982). I find that Boros' statements concerning wearing union insignia violated Section 8(a)(1).

C. The 8(a)(3) and (1) Allegations

1. Incidents involving Sabatini

Sabatini testified that when he went to the shop on the morning of January 3, 1995, Parker told him there was no work available and that he should call back at 4:30 that afternoon. When he did so, Parker told him to sign up for unemployment. On January 5, Sabatini called and told Boros that he would be in that day to pick up his paycheck. Before going to the shop that day, Sabatini went to the union hall and got a tape recorder, as Thomas wanted him to ask if he had been laid off due to his union activities and to record the answer. When he arrived at the shop, Sabatini turned on the concealed recorder. He got his check and asked to speak with Boros. He asked if he had been laid off because of his union activity or his diabetic condition and Boros said he had not. They discussed the fact that Sabatini had to go to court the following week on a DUI charge and that he had been offered a deal involving a 30- to 45-day jail sentence. Sabatini also spoke to Parker and asked him if his union activity was the reason for his layoff. Parker responded that he was "just an innocent bystander.'' When Sabatini opened the envelope containing his paycheck, he found a written warning referring to a number of incidents involving his work performance which the Employer considered "substandard'' and stating that any additional violation of its work rules would result in his termination. He testified that he was not told about the warning letter nor was it discussed before he left the shop. When he went to court, Sabatini accepted the deal to serve 30 days in jail and was released on February 16 or 17. He testified that he did not contact the Employer when he got out because he thought he had been fired. He attempted to contact Parker by calling the shop during the first week of March but he was not in. He spoke briefly with Boros' father, who is retired but has an office in the same building as the Employer. He asked Boros Sr. if there was any work and he said there was none other than for the guys that were already working. He did not call the Employer again and he has never been contacted by it. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) by issuing the written warning to Sabatini and by terminating his employment some time in March in retaliation for his activity in support of the Union.

Analysis and Conclusions

In cases where the employer's motivation is in issue, its actions must be analyzed in accordance with the test outlined by the Board in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Under *Wright Line,* the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the part of its employees.

I find that the General Counsel has made such a showing with respect to the written warning issued to Sabatini on January 5. Direct evidence of unlawful motivation is difficult to obtain and is not essential. Circumstantial evidence and the inferences drawn therefrom can be relied on to establish motivation. *Abbey's Transportation Services,* 284 NLRB 701 (1987); *NLRB v. Pete's Pic-Pac Supermarkets,* 707 F. 2d 236, 240 (6th Cir. 1983). The Respondent's opposition to the Union's organizing efforts and the violations of Section 8(a)(1) found herein establish its union animus. The evidence shows that the Employer had reason to suspect that Sabatini was instrumental in getting the organizing effort started and the warning was issued shortly after it learned that employees had met with the Union. The timing of an employer's action can be persuasive evidence of its motivation. *Limestone Apparel Corp.,* 255 NLRB 722, 736 (1981).

I also find that the Respondent has established that it would have taken the same action even in the absence of protected activity on Sabatini's part. There is evidence that each of the incidents referenced in the warning occurred and was considered by the Employer to be serious. Accordingly, I find that the bases for the warning were not pretextual. The timing of the January 5 warning letter is explained by Boros' credible testimony that its issuance was precipitated by an incident during the previous week at the Salmac job in which Sabatini had shut off the power without telling anyone and caused the customer's computer system to go down. The customer called Boros to complain and ultimately refused to pay the invoice issued for the job which had to be rescinded. Sabatini does not deny the incident or his responsibility for what happened, although in his testimony he attempted to downplay it and the other incidents referred to in the warning. The record contains a letter from the customer dated January 5, a day after the warning was prepared, and the General Counsel implies that this is suspicious. However, given the nature of the incident, I do not doubt Boros' testimony that the customer called him to complain immediately after it occurred. I also do not credit Sabatini's testimony that Boros was not upset about the incident and said only "so what'' or "things happen.'' I similarly do not credit his direct testimony to the effect that he had never been made aware of any problems with his work before the warning was issued. On cross-examination he admitted that he was talked to by Parker and was removed from the Mango Bay job, referred to in the warning. That occurred in November after he had made several serious circuiting errors and the customer had complained that he had fallen asleep on a ladder while on the job. One of the incidents referred to in the letter, involving his rudeness to personnel at the Cleveland Dialysis Center, had occurred during the previous summer and there was no independent evidence that it had been raised with him before. However, Boros credibly testified that he was reminded of the incident by Parker on January 4 when he was considering sending

Sabatini there on a service call. While it can be argued that raising such an old matter in the warning for the first time is evidence of improper motivation, after considering all of the circumstances, I do not infer that to be the case. There is no evidence that any of the incidents referred to in the warning did not happen or were not Sabatini's fault. The warning states that it is being issued because of a number of incidents of substandard work performance by Sabatini and enumerates them. No adverse action was taken against him as a result of the warning but he was put on notice as to the nature of incidents and the consequences of another similar incident. I shall recommend that this allegation be dismissed.

The complaint also alleges that Sabatini was discharged by the Respondent because of his protected activity. I find that the General Counsel has not established a prima facie case that the Respondent unlawfully discharged him. The original charge in Case 8–CA–27263 alleged that Sabatini had been discharged on January 3 and he testified that he thought that he had been fired as of that date. However, the complaint alleges that he was not discharged until some time in March. This was after he finished serving his jail term and was not put back to work. It does not allege that his layoff on January 3 was unlawfully motivated. The General Counsel asserts that the Respondent unlawfully discharged Sabatini because it did not contact him and offer him available employment after it became aware that he was out of jail and wanted to return to work for it. He contends that it learned this when Sabatini spoke to Boros Sr. on March 8 and that it had work available when it interviewed a new employee on March 17. While I agree there is evidence of animus on the part of the Respondent, I do not believe that any nexus has been established between that animus and the fact that it did not seek out Sabatini and offer him work in March. He he left the office on January 5, Sabatini told the Employer that he was headed for jail for an indefinite period. He got out of jail on February 16 or 17 but he did not call the Employer seeking work because he said he thought he had been fired back in January. On March 8, he called the shop to speak to Parker, who was not in, and he never called back. The question is whether his conversation with Boros Sr. on that date establishes that the Respondent knew that he was available for and seeking work and, thus, supports the inference that it failed to offer him work because of his protected activity. I find that it does not.

Sabatini testified generally that he asked Boros Sr. if he had any work and he said only for the guys who were already working. Boros Sr. credibly testified that he is retired, that he has an office in the same building and sometimes helps out, but that he is not an employee of the Respondent, does not have an ownership interest in it and is not compensated by it. He testified that he answered a telephone call from Sabatini at the office on March 8. Sabatini said, "Hi, boss, how you doing, what's going on?'' He responded, "not much of anything'' and said there were several jobs that "have not come home.'' He asked what Sabatini was doing and said he thought he was in jail. Sabatini said that he had served mostly weekends due to overcrowding and was now out. Boros Sr. told Sabatini that Parker was not in but would be back in 10 minutes and asked if he wanted him to call. Sabatini said that he would call back in 20 minutes or the next morning and hung up. Boros Sr. testified that at no time did Sabatini inquire about the availability of work for himself. He filled out a message slip for Parker indicating that Sabatini had called and would call back.

I found Boros Sr. to be a credible witness and believe his version of what was said during the March 8 telephone call. The message slip he prepared for Parker at the time is consistent with that version and I find it unlikely that, if Sabatini had said that he was calling to inquire about the availability of work, he would not have included it in that message. There is no evidence that Boros Sr. had any involvement in the Respondent's personnel decisions. I find this brief telephone conversation did not constitute notice to the Respondent that Sabatini was available and seeking work with it. Consequently, I also find there is no basis to infer that the Respondent was aware that Sabatini was seeking to return to work for it and failed to recall him. I shall recommend that this allegation be dismissed.

2. Incidents involving Jordan and Law

After their encounter with Boros on the afternoon of April 5, Jordan and Law made up signs saying that Mauka refused to pay union wages and benefits which they planned to use to picket at their jobsites the following day. At about 6:30 the next morning, Law arrived outside his jobsite at Sawyer Research and put up his picket signs. Jordan joined him at about 7 a.m. and they picketed until 7:30 a.m., when Law went inside to start work and Jordan went to a job at TDI. Both were wearing their union T-shirts. At lunch time, Law picketed out in front of Sawyer Research for about a half hour. About 1:30 p.m., Boros came to Law's jobsite and told him and his coworker to meet with him outside the building. Boros first told Law the results of his contact with his attorney concerning wearing the shirts with the union logo. He then said that Law had to leave the jobsite because of a written request by Sawyer Research and that he should call at 9 a.m. the next morning. Law asked to see the request but Boros refused to show it to him. Law's coworker continued to work at the jobsite. Also at lunchtime that day, Jordan picketed at his TDI jobsite. After he got home that evening, Jordan got a call from Boros who told him not to report to the TDI job the next day. Boros said that he had received a letter and Jordan was not allowed on the TDI property but should report to the shop at 1 p.m.

When Law called the next morning, Friday, April 7, Boros told him to report to the shop. Law arrived about 10 a.m. and Boros assigned him to rewiring some light fixtures and to repair an exhaust fan in the shop. At lunchtime, Law went outside and picketed along with Jordan, carrying signs saying that Mauka refused to pay union wages and benefits. While they were picketing, Boros came out and photographed them. At 12:30 p.m., Law went into the shop and told Boros that he was going on an unfair labor practice strike to protest the unlawful discipline of himself and Jordan and the unlawful discharge of Sabatini. Jordan reported for work at 12:30 p.m. and was sent to draw a material list for a job. His normal starting time was 7 or 7:30 a.m., depending on the job.

Law testified that he left the shop and went to the union hall where he discussed what had occurred and his decision to go on strike with Thomas. They made plans to picket at the shop on the following Monday. Law and Thomas arrived at the shop at about 11 a.m. on Monday and began picketing, carrying signs that read, "Unfair Labor Practice Strike Against Mauka Electric.'' After they had picketed about 10 minutes, Boros came outside, looked at the signs, said to Law, "I'm going to cut your head off for this'' and photographed them. About 10 minutes later, Law and Thomas left and went to the Mentor Police Department where Law filed a complaint concerning Boros' re-

marks while he was picketing. Thomas also testified that, while they were picketing on April 10, Boros came out and took a photograph and told Law he was going to cut his head off.

On April 13, Law hand delivered to Boros a written notice making an unconditional offer to return to work. After Law had given the notice to Boros and left the shop, he went back to get his keys which he had left inside. At that point, Boros told him to call between 4 and 5 p.m., as he might have something for him at that time. When Law called him that afternoon, Boros said he had no work for him and that he was laying off people. Law heard nothing further from the Respondent until he received a letter signed by Boros, dated May 15, 1995, stating that it considered him to have abandoned his job and that he was being removed from its employee list.

Analysis and Conclusions

The credible and uncontradicted testimony of Law, Jordan and Thomas establishes that Boros photographed Law and Jordan while they picketed on April 7 and Law while he picketed on April 10. Board law is clear "that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate.'' *F. W. Woolworth Co.,* 310 NLRB 1197 (1993). There was no evidence that the picketing was disruptive, that the employees engaged in any misconduct, or that the Respondent had any reason to believe that they would. Consequently, there was no justification for the photographing and it violated Section 8(a)(1). The credible and uncontradicted testimony of Law and Thomas establishes that when Boros approached the picketers on April 10, he told Law that he would cut his head off. It is immaterial whether Boros intended his statement to be taken literally or merely as a colorful figure of speech. The clear import of the statement was that he wanted to retaliate against Law and the threatened conduct had the tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Cox Fire Protection,* 308 NLRB 793 (1992). By threatening an employee with physical harm for engaging in protected activities, the Respondent violated Section 8(a)(1). E.g., *Eskaton Sunrise Community,* 279 NLRB 68, 77 (1986); *Lord Jim's,* 259 NLRB 1162, 1164–1165 (1982).

I find that the General Counsel has established a prima facie case under *Wright Line,* that Law and Jordan were removed from their jobs at Sawyer Research and TDI, respectively, in retaliation for their having engaged in protected activity by wearing their union T-shirts and buttons on the job and by picketing in front of the jobsites on April 6.[5] The Respondent contends that it was not unlawful to remove them from the jobsites and that the complaint allegations are insufficient to allege a violation of Section 8(a)(3). The evidence is clear that both were prevented from working on these jobs and that they lost pay as a result.[6] Law was not paid for the afternoon of April 6 and was not put back to work until midmorning on April 7. On that date, Jordan was not put to work until the afternoon. The complaint allegations make it clear that the whole series of events involving their removal from their jobsites and reassignment to other jobs because of their protected activity were alleged to be unlawful. I find that the Respondent was given sufficient notice of what was in issue and that these matters were fully litigated.

The Respondent apparently does not dispute that these employees were removed from their jobsites because of their wearing union shirts and picketing but contends that it had a legal right to do so and that it was required to do so because of "directives'' from its customers. The Respondent has offered no other explanation for their removal. It presented no evidence to support its claim that it was directed to do so by its customers. I do not find the testimony of Law and Jordan as to the self-serving statements made by Boros when he removed them to be probative evidence. Both were told that customers had made written complaints about them but they were not shown the alleged complaints even though Law specifically asked to see one. No copies of the alleged complaints were proffered as evidence at the hearing and Boros did not testify about these incidents. Accordingly, I find that the Respondent failed to establish that it was acting pursuant to customer complaints when it removed Law and Jordan from their respective jobsites. Even if there were such "directives,'' it would not change the result. "A desire to please a a customer does not, alone, provide a business justification for infringing employees' statutory rights.'' *Control Services,* 303 NLRB 481, 485 (1991). There is no evidence to support the Respondent's contention that the actions of Law or Jordan were disruptive of the customers' businesses and detrimental to the Respondent's relationships with those customers. Consequently, it has not established any "special circumstances'' which would justify such infringement. Since it has not established that it would have taken the same actions with respect to Law and Jordan had they not engaged in protected activities, I find that the Respondent violated Section 8(a)(3) and (1) by removing them from their jobsites and causing them to lose pay in retaliation for their having worn Union shirts and picketed at the jobsites.

The General Counsel contends that Law was an unfair labor practice striker and that once he made an unconditional offer to return to work the Respondent was obligated to reinstate him to his previous position of employment. The Respondent contends that Law's actions did not constitute protected activity. Although I have found that Law was the victim of certain unfair labor practices committed by the Respondent and do not doubt but that they were part of his motivation for declaring himself to be on an unfair labor practice "strike'' on April 7, I do not believe he was engaged in protected concerted activity when he did so. The Board's standard for determining whether an employee's activity is concerted is found in its decision in *Meyers Industries,* 281 NLRB 882 (1986), where on remand it reaffirmed the definition in its prior decision in that case*, Meyers Industries,* 268 NLRB 493 (1984), that it must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'' Id. at 497. Law's uncontradicted testimony establishes that he informed Boros that

[5] Citing the Board's decision in *Plumbers Local 388 (Barton Malow Co.),* 262 NLRB 126 (1982), the Respondent asserts that Law's picketing at Sawyer Research constituted a violation of Sec. 8(b)(4) of the Act and was not protected activity. I find that it has not proved this, as contrary to its contention, the evidence shows that at least one other of its employees, Saltenis, was working at the jobsite when Law was picketing and there is no proof that his picketing or that of Jordan was solely for the purpose of appealing to employees of secondary employers not to perform services for those employers.

[6] This attack on the wording of the complaint also appears to be the basis for the Respondent's argument that the complaint allegations are not supported by a charge. The charge in Case 8–CA–27296 alleges that those employees were "disciplined'' on or about April 7. The Respondent's actions with respect to Law and Jordan on April 6 and 7, referenced in the complaint, clearly constituted discipline.

he was going on an unfair labor practice strike to protest the Respondent's treatment of himself and Jordan and the alleged unlawful discharge of Sabatini, but it fails to establish that he discussed such a strike with or sought to enlist the support of any fellow employee, even Jordan, with whom he had been picketing outside the shop, before he did so. No other employee joined him in striking. Given these circumstances, I do not believe that the Board's decision in *DeMuth Electric, Inc.,* 316 NLRB 935 (1995), cited by the General Counsel, supports a finding that Law's "strike'' was protected concerted activity within the meaning of Section 7.

Considering the Respondent's actions under *Wright Line,* supra, I find that there is insufficient evidence to support an inference that the Respondent made a decision not reemploy Law or that protected conduct was a motivating factor in any such decision. It was the actions of Law, not the Respondent, which resulted in his no longer working for it. Although Law implied in his testimony that he considered the work he was given on April 7 to be demeaning, it has not been alleged and I would not find, that he was constructively discharged. It was Law's choice to walk away from his employment with the Respondent. Although he requested his job back when he delivered his "unconditional offer to return to work,'' the evidence fails to show that there was a position available at that time or that he made a reasonable good-faith effort to follow up on that request. He first testifed that when he delivered his offer to return to the Respondent, Boros said only that he did not have anything for him. When he went back in the office to get his keys, Boros said to call him between 4 and 5 p.m. that afternoon. He did so but was told there was nothing available. He heard nothing further until the letter of May 15 informing him that the Respondent had removed him from its employee list. However, on cross-examination, Law admitted that Boros had told him first that if he had not heard anything by the following Monday, he should call in on Tuesday. He did not do so. Law may have felt that Boros' telling him to call back that afternoon relieved him from calling back on Tuesday, but there is no evidence he was ever told that or otherwise excused from calling in on Tuesday. Notwithstanding the fact that he had made a request that the Respondent reemploy him, Law made no effort beyond a single telephone call to see if anything was available. Since he was not an unfair labor practice striker entitled to immediate reinstatement, the burden was on Law to make a reasonable effort to find out if there was work for him. He did not do so. Consequently, there is no basis to infer that the Respondent failed to offer him an available position or that it did not do so because he had engaged in protected activity. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Mauka, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by

(a) Coercively interrogating employees concerning union activities.

(b) Giving employees the impression that their union activities were under surveillance.

(c) Threatening employees with loss of employment if they selected the Union as their collective-bargaining representative.

(d) Prohibiting employees from wearing shirts and buttons displaying the Union's logo while working or on its property.

(e) Coercing and interfering with employees' rights by telling them it would not discuss requests for an increase in wages and benefits with them collectively but only on an individual basis.

(f) Photographing employees while engaged in protected activities.

(g) Threatening an employee with physical harm for engaging in picketing outside its facility.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by removing employees Cregg Law and Keith Jordan from their jobsites, reassigning them to other jobs, and causing them to lose wages because they had engaged in activity in support of the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7).

6. The Respondent did not engage in those unfair labor practices alleged in the complaint not specifically found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent discriminated against employees Cregg Law and Keith Jordan by causing them to be removed from their jobsites and lose wages on April 6 and 7, 1995, I shall recommend that the Respondent be required to make them whole for such lost wages, plus interest to be computed as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]